In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944.

No. 76

UNITED STATES OF AMERICA,
Petitioner,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

BRIEF OF ZELLERBACH PAPER COMPANY (A CORPORATION), AS AMICUS CURIAE, ON BEHALF OF RESPONDENT, GENERAL MOTORS CORPORATION.

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STATEMENT OF INTEREST OF AMICUS CURIAE.

Zellerbach Paper Company, a corporation, respectfully asks leave to file this brief, as *amicus curiae*, on behalf of the respondent, General Motors Corporation.

Zellerbach Paper Company is engaged in the wholesale distribution and sale of various kinds of merchandise. It owns a warehouse situated in the City of

Los Angeles, California. This warehouse was formerly used in its business and was specially designed and equipped for this purpose. The property is now and has been in the possession of the United States of America since December 9, 1942. Possession of this property was taken by the United States pursuant to the provisions of Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177c, 199, sec. 201, 50 U.S.C. App. Supp. III, sec. 632. The United States has not taken a fee in this property, but only the temporary use thereof, for a term of years, renewable at its option.

There is now pending in the District Court of the United States in and for the Southern District of California, Central Division, an action entitled, "United States of America, Plaintiff, vs. 6.35 Acres of Land More or Less, etc., Zellerbach Paper Company, a corporation, et al., Defendants", No. 3132-H Civil, on the records and files of said District Court.

In said last-named action, there will be determined, in the first instance, the "just compensation" to be awarded to Zellerbach Paper Company for the taking of its warehouse. The questions of law which are to be determined in the action, in which Zellerbach Paper Company is defendant, arise out of facts substantially similar to those which are before this Honorable Court in this case. The decision of this Court in the present cause may establish a precedent which may be binding upon the said District Court, not only in ruling upon the admissibility of evidence to be offered by the par-

ties on the issue of "just compensation", but also as to the elements which constitute such compensation.

In this brief, the *amicus curiae* intends to support the contentions of the respondent General Motors Corporation.

OPINIONS BELOW.

The District Judge of the United States before whom the cause was tried did not write an opinion. The opinion of the Circuit Court of Appeals (R. 114-123) is reported in 140 Fed. (2d) 873.

JURISDICTION.

The jurisdiction of the Court was invoked by the petitioner, United States of America, under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

The United States sets forth in its brief the following statement of the question presented:

> "Whether, in a proceeding by the United States to acquire the temporary use of business property, necessary expenses incurred by the lessee in vacating the premises constitute an element of 'just compensation' within the Fifth Amendment."
>
> (Brief for the United States, pp. 1-2.)

The foregoing statement appears to ignore one of the important elements of the question involved, and for this reason the *amicus curiae* re-states the question as follows:

> Whether, in a proceeding by the United States to acquire the temporary use of business property, necessary expenses incurred by the lessee in installing property and equipment to make the property suitable to its business and in vacating and preparing the premises for occupancy by the United States constitute an element of "just compensation" within the Fifth Amendment.

STATEMENT OF THE CASE.

The statement of the case contained in pages 2 to 5 of the government's brief is substantially correct, except for the matter hereinafter noted.

At page 3 of the brief, the following footnote appears:

> "The word 'demolished' as used in the offer of proof referred to the dismantling of equipment and not its destruction. The property and inventory removed were not fixtures. As General Motors' offer of proof states, the property 'demolished' (i.e., dismantled and removed) was 'bins and other personal property'."

The statement contained in this footnote is not entirely accurate, as it appears from the record and from the statement contained in the brief at page 4 thereof that the respondent's offer of proof sets forth that bin equipment of the value of $5062.90 was de-

stroyed when the removal was carried out. (Offer of Proof No. 33, R. p. 53.) The word "destroyed" being synonymous with the word "demolished", it is submitted that when used in the offer it did not refer alone to the dismantling of the equipment, but also to its destruction.

ARGUMENT.

A. THE FAIR DETERMINATION OF JUST COMPENSATION FOR THE TAKING OF TEMPORARY USE OF REAL PROPERTY REQUIRES THAT THE PERSON HAVING THE RIGHT TO THE USE AND OCCUPANCY THEREOF BE PERMITTED TO SUBMIT TO THE JURY MAKING SUCH DETERMINATION PERTINENT EVIDENCE OF THE "VALUE IN USE" TO IT OF SAID PROPERTY AND OF ALL THE COST INCURRED IN PUTTING SAID PROPERTY TO EFFICIENT USE.

At the trial of the action, during the examination of respondent's witness Charles R. Thorp (R. pp. 28-43), he was asked to describe any special facilities which aided the operations conducted by the respondent in the warehouse (R. p. 39), and, in reply to this question, the witness testified that:

> "The building had particular value for the operation, from the fact that it is one-story and had the necessary truck and rail facilities to efficiently handle the products in and out of the building."
>
> (R. p. 40.)

Upon motion made by the government's attorney, this answer was stricken. (R. pp. 40-41.)

Thereafter, the respondent made the following offer of proof, which was rejected by the District Court:

"Defendant offers to prove by Mr. Charles Essex that defendant had at the premises in Clearing installed equipment in the amount of approximately $101,000, consisting of bins and other facilities for a central distributing point; that it had at said location an inventory of parts and machinery of approximately $250,000; * * *"
(R. p. 49.)

We contend that the above-quoted testimony should not have been stricken and that the offer of proof should not have been rejected. The excluded evidence was admissible on two grounds:

1. As pertinent evidence of the value in use of the warehouse to respondent; and

2. As pertinent evidence of the cost of putting the property to efficient use.

1. As pertinent evidence of the value in use of the warehouse to respondent.

We have long recognized that "no piece of land has its counterpart anywhere else and is impossible of duplication by the expenditure of any amount of money".[1]

On the basis of this principle, our Courts have uniformly ruled that money damages do not adequately compensate for the loss of land. However, we also recognize that when land is rightfully taken by the government through eminent domain proceedings the only compensation possible is an award of damages to the expropriated owner. And it seems to be gen-

[1] 49 Amer. Jur. 107, Specific Performance, sec. 92.

erally conceded that such compensation is seldom full or adequate. Therefore, in eminent domain proceedings, and in consonance with sound principles of justice and economics, the unique quality of land as property is admitted and compensation for its taking is not based solely on market value, that is, what others than the owners would pay for it, but also on its *value in use to the owner*. That failure to give consideration to these principles would result not only in gross under-indemnity to the owner, but would also constitute an unwarranted departure from sound economic doctrine, is the view expressed by Mr. Bonbright, from whose work, "The Valuation of Property",[2] we quote the following excerpts:

> "* * * Real property belongs in that class of wealth which is often worth more to a given owner than to any prospective purchaser. This is true because, instead of being standardized like wheat, or government bonds, or tubes of shaving cream, improved real estate may be specially constructed for, or adapted to, the peculiar needs of its occupants. If the United States Steel Corporation were to be reimbursed for its Gary plant at the mere price at which this company could sell it to some rival enterprise, or if the owner-occupant of a house and lot were to be forced to vacate it on payment of nothing more than the price at which he could market it, gross underindemnity might well result. Yet, if market value is accurately construed, only sale price can properly be allowed. On the other hand, if it is so construed as to include the special value of the property to

[2] James C. Bonbright, "The Valuation of Property" (McGraw-Hill, 1937, two volumes).

the owner, it becomes an unfortunate synonym for this latter standard of value.

* * * * * * *

"But even when the market-value criterion is rejected, the courts by no means invariable turn openly to the alternative of special value to the owner. Perhaps more frequently they invoke some completely undefined, mythical concept of 'real' or 'actual' value—a value supposedly inherent in the property itself without reference to the peculiar relations between the owner and his valued possession. This economic heresy, which pervades the literature on the Continental law of expropriation and taxation (under the heading of 'objective value' or 'value to everyone') no less than American law (under the heading of 'real value' or 'intrinsic value'), goes hand in hand with the orthodox doctrine of eminent domain as constituting a proceeding *in rem* rather than a proceeding *in personam*—a doctrine, some of the implications of which have been violated under more modern theories of jurisprudence."[3]

In addition to the compulsion exercised by the duty to adhere to sound principles, there is another equally valid reason which compels the Courts to give consideration to the value in use of a particular property to the owner. It is almost universally conceded by the Courts that the "just compensation" referred to in the Fifth Amendment to the Constitution is a compensation sufficient to make good the loss to the owner, and it is asserted that a corollary to this proposition is that when property is taken its value to the owner

[3]Bonbright, op. cit., pp. 415-416; p. 420.

is the only strictly relevant value to be considered. This proposition, and its corollary, has been thus stated by Mr. Lewis Orgel in his treatise "Valuation Under the Law of Eminent Domain",[4] at page 146:

> "'Just compensation', say the courts of this country including the highest court, is a compensation sufficient to make good the loss of the owner. In the words of Mr. Justice Butler, the owner is 'entitled to the full money equivalent of the property taken, and thereby to be put in as good a position pecuniarily as it would have occupied, if its property had not been taken.'
>
> "A corollary of this proposition would seem to be that, when property is taken, its value to the owner is the only strictly relevant value, and that market value is acceptable only to the extent that it may be taken as a rough, practical measure of value to the owner. Precisely this reason for the adoption of the market-value rule has been adduced by the courts."

It would seem to follow, from the foregoing, that, if "market value is acceptable only to the extent that it may be taken as a rough, practical measure of value to the owner", then, when it does not meet this test, it should be disregarded and reliance placed upon the value to the owner alone. However, the Courts have not always, in practice, followed through to the conclusion that Mr. Orgel's postulate compels, but have, nevertheless, considered such value in use as evidence of market value. Thus, in the California case of

[4]Lewis Orgel, "Valuation Under the Law of Eminent Domain" (one volume, The Michie Company, 1936).

Oakland v. Pacific Coast Lumber etc. Co., 171 Cal. 392, 400, 153 Pac. 705 (1915),

where it is stated that:

> "* * * Nor yet has this court ever said that *the value in use*, as contra-distinguished from the estimated value of a proposed problematical use, *might not be given in terms of money, not as determinative of the question, but as being evidence of the ultimate fact which the jury is called upon to find, namely, the market value* * * *" (Italics ours.)

Mr. Bonbright opines that, although this Court has declared that the objective in eminent domain proceedings is fully to indemnify the owner, it has, in practice, applied "fair market value" as the universal criterion and entirely ignored value to the owner, and in this connection states:

> "The vital distinction between the value to the owner of property especially adapted to his needs, and the market value of that same property, has been generally ignored by the Supreme Court. This Court has often talked as if 'fair market value' were the universal criterion under the law of eminent domain. Yet, in the very cases in which it has invoked this standard, it has also declared that the objective is fully to indemnify the owner for what *he* has lost; and it has even referred in so many words to 'value to the owner' as the proper measure of compensation and as if it were a perfect synonym for 'fair market value'."[5]

[5]Bonbright, op. cit., vol. 1, p. 421.

We do not believe that the foregoing is an accurate statement of the position taken by this Court. The fact appears to be that the issue of real, actual value in use to the owner has never been presented to the Court. Rather, the Court has been asked to rule that the owner is entitled to show the value of some hypothetical or proposed problematical use, as was the case in

U. S. ex rel. T. V. A. v. Powelson, 319 U. S. 266, 63 S. Ct. 1047, 87 L. Ed. 1390 (1943),

where this Court was asked to hold that the owner was entitled to show the value in use of a hypothetical hydroelectric project.[6] This the Court refused to do, but in so doing re-stated the principle for which we contend, in the following language:

> "An owner of lands sought to be condemned is entitled to their 'market value fairly determined'. United States v. Miller, 317 US 369, 374, ante, 336, 342, 63 S Ct 276, 147 ALR 55. That value may reflect not only the use to which the property is presently devoted but also that use to which it may be readily converted. Mississippi & R. River Boom Co. v. Patterson, 98 US 403, 25 L ed 206; McCandless v. United States, 298 US 342, 80 L ed 1205, 56 S Ct 764. * * *"[7]

Obviously, "the use to which the property is presently devoted" refers to the use the owner was making of the premises at the time of the taking; and it is equally obvious that it is that use which he loses by the taking. Therefore, if, as universally conceded, com-

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[6] *U. S. ex rel. T. V. A. v. Powelson, supra*, 274-275.
[7] *U. S. ex re. T. V. A. v. Powelson, supra*, 275.

pensation is measured by the owner's loss,[8] there is no reason why the respondent in this cause should not be permitted to show the use to which it was devoting its property—the use which it has lost by the taking—and, indeed, a fair determination of the market value of the property would require the submission of this evidence to the jury—otherwise, how might this use be reflected in "market value"?

It is, therefore, submitted that the testimony describing the facilities which aided in the use and operation of respondent's property should not have been stricken (R. pp. 39, 40, 41), and that the offer of proof which referred to the installed equipment and inventory carried (R. p. 49) should not have been rejected, for the reason that, without this evidence, the market value could not be fairly determined, the jury not having been afforded the opportunity of determining whether the use of the property might be reflected in its assessment of market value.

2. As pertinent evidence of the cost of putting the property to efficient use.

The testimony stricken by the lower Court, that in which Mr. Thorp described the particular value which the premises had for the operations conducted by the respondent (R. p. 40), laid the foundation for the introduction of the evidence referred to in the rejected offer of proof, to-wit, the cost of the equipment installed and the value of the inventory maintained. The matter involved in the rejected offer of proof was

[8] *U. S. ex rel. T. V. A. v. Powelson*, *supra*, p. 281.

relevant to the cost of production and reproduction of the premises as a going and operated warehouse, but, as a necessary prerequisite to its admission in evidence, the respondent was required, as it did, to show that the property was efficient and of particular value to the operations conducted by it. In the absence of such a showing, or if it were positively shown that the warehouse was inefficient and wasteful, no one would be interested in its cost of production or reproduction, and then such cost would be irrelevant and the property would be worth only what it would bring as vacant, non-operating property. (Orgel, op. cit., sec. 191, p. 600.)

Once having established value in use, the respondent was entitled to prove "going concern value" in the sense of a cost item entering into the estimate of cost of reproduction of the warehouse.

> "But in the eminent domain cases, unless the entire enterprise is being condemned, the owner is not entitled to compensation for the value of the business over and above the property taken. Consequently, in these cases it make a difference whether 'going concern value' is used in the sense of a cost item entering into the estimate of cost of reproduction or whether it is considered as a value in excess of the reproduction cost of the physical property. *In the former sense, 'going concern value' is admissible as bearing on the cost of reproduction.* In the latter sense, it is an element of the value of the entire enterprise for which no compensation is awardable and it is therefore immaterial." (Italics ours.)
>
> Orgel, op. cit., sec. 191, p. 599.

And, in proving the cost of reproduction, the owner is entitled to show every necessary expenditure made in producing a live, going, efficient and functioning plant.

United States v. Becktold Co., 129 Fed. 473, 478 (1942);
Sparkhill Realty Corp. v. State, 242 App. Div. 862, 865-866, 275 N. Y. Supp. 766 (1934);
Banner Milling Co. v. New York, 240 N. Y. 533, 543-545, 148 N. E. 668, 671-2;
41 *A. L. R.* 1019, 1025 (1925);
White v. Cincinnati, etc. R. R. Co., 34 Ind. App. 287, 293-4, 71 N. E. 276, 278 (1904).

The operation of the rule contended for is best illustrated by the cases of *Banner Milling Co. v. New York, supra*, and *Sparkhill Realty Corp. v. State, supra.*

In the case of *Banner Milling Co. v. New York*, the Court of Claims had in the first instance assessed the compensation due to the owner of an operating flour mill which had been condemned by the State of New York. At the trial the owner showed, and the lower Court found, that "the fair value of architects and engineers' fees upon the construction and equipment of said plant, insurance premiums and interest on investment during construction period, railway franchises, legal expenses, sundry items correcting errors in construction, expenses incurred in operating mill at a loss up to time when machinery is synchronized and coordinated so as to produce satisfactory results is the sum of seventy-five thousand dollars ($75,000)." (240 N. Y. 544-5.) The Court of Claims refused to

award to the owner the specific sum so expended and in so doing made the following statement of principles it would follow in fixing the owner's compensation:

> "'*The claimant is entitled to recover the value of its physical property as it existed at the time of the appropriation.* That does not mean that its value is to be arrived at by taking the value of the various elements and items making up the property separately, and considering them without reference to each other, and then adding together these sums. The claimant is entitled to compensation, not merely for so much land, so much brick, lumber, materials, and machinery, considered separately; *but, if they have been combined, adjusted, synchronized, and perfected into an efficient functioning unit of property, then it must be paid for that unit, so combined, adjusted, synchronized, and perfected, as it existed at the moment of appropriation. In that limited sense, it is entitled to the "going value"—if such a term is permissible—of its physical property. In fixing the amount of award we will be guided by that principle.*'" (240 N. Y. 544.) (Italics ours.)

On the appeal, the New York Court of Appeals upheld the refusal of the Court of Claims to award the specific sum claimed for expenses incurred in making the mill an efficient functioning unit, but held at the same time that the lower Court had properly considered all of these items in arriving at the value of the mill, and said:

> "Nowhere does it appear, however, that all these elements making up this $75,000 expense were not considered by the court in arriving at its total

figure of valuation. What element it considered or excluded is not stated. As I have said, the claimant was not entitled as a matter of law to recover these expenses; *it was entitled to have them considered as necessary in building up and constructing the mill as a going concern, efficient and appropriate for the business.*" (240 N. Y. 545.) (Italics ours.)

Equally specific on the expenditures which may be considered in measuring the ultimate award is the case of *Sparkhill Realty Corp. v. State, supra,* where it is stated:

> "It is doubtless true that the expenses incurred in the development of the property may be properly considered in determining its value when taken, such as cost of surveying; or architecture and engineering, of the purchase, trial and replacement of fixtures, legal expenses and payroll growing out of the work of development." (242 App. Div. 865-6.)

It is clear that under the above cases the evidence relating to the cost of bins and facilities installed and inventory carried by respondent in its warehouse falls squarely within the category of expenditures which must be considered in arriving at the cost of reproduction.

We submit further that it is immaterial whether these items of cost and expense are looked upon as personal property as regards their origin, because if they contribute to the efficient operation of the warehouse they are as relevant to the issue as "expenses incurred in *operating mill at a loss* up to the time

when machinery is synchronized and coordinated so as to produce satisfactory results", an item which the New York Court of Appeals, in *Banner Milling Co. v. New York, supra,* held was properly before the lower Court in the assessment of compensation. In other words, these items are merged with the functioning structure, and thereby lose their original identity.

It is self evident that the efficiency as a functioning unit of the warehouse could not be determined or tested before bins and other equipment for the storage and movement of inventory had been installed, or before the stock carried was stored and moved—up to that time the property had the status of vacant, non-operated property. It is equally self evident that the cost of such equipment, its installation, necessary re-arrangement, etc., as well as the cost of moving a large stock of merchandise in and out of the premises during the test or trial period was a necessary expense of putting the property in efficient use. These overhead costs have been entirely lost to respondent, and although they may not be easily allocated to the cost of the physical structure, they contributed to and are part of its value in use or "going concern value" and must, therefore, be considered in arriving at these values.

> "In one sense, going concern value is a mere synonym for overhead costs, that is, expenditures not easily allocated to other physical costs, but to be considered with these other charges in arriving at the cost of reproduction."
>
> Orgel, op. cit., sec. 191, p. 597.

Accordingly, it is submitted that the rejected evidence was material and relevant, not only to the value in use of the property, but also as an item of expense to be considered in arriving at the cost of reproduction of the premises.

B. IN A PROCEEDING TO ASSESS "JUST COMPENSATION" FOR THE TAKING OF TEMPORARY USE OF PROPERTY, THE OWNER, OR THE PERSON HAVING THE RIGHT OF POSSESSION, IS ENTITLED TO PROVE OUT-OF-POCKET EXPENSES REASONABLY AND NECESSARILY INCURRED IN VACATING THE PREMISES AND PREPARING THEM FOR THE GOVERNMENT'S TEMPORARY OCCUPANCY.

It is clear that, under the facts of this case, the respondent is entitled, under its contract or lease, to the exclusive use and occupancy of the property in question. The lease extends until May 31, 1948 (R. p. 91) and the government has taken the respondent's right of exclusive use and occupancy for the period of only one year. The lease, therefore, is still in effect, and the respondent is still subject to the duties thereby assumed, including the payment of rent, and remains entitled to the use and occupancy of the premises until the end of the term, except for the temporary taking of this use and occupancy by the government for one year. Obviously, therefore, the government has not taken the lease, but only the respondent's right of the use thereunder, and is not obligated to pay for the lease, but only for the temporary use thus acquired.

Under such circumstances, the respondent has, for the purposes of this action, the position of an owner occupying and using its property whose use and occupancy is temporarily suspended by government action. This being so, the respondent has the right to prove, in addition to the value in use and cost of putting the property to efficient use, any other pertinent evidence bearing on the question of the value of this temporary deprivation of use, as well as the diminution of the value of the use of the property to it during the period of the government occupancy. To this end, the respondent offered to prove, at the trial of the action, that it had expended the total sum of $53,451.64 in vacating and preparing the property for the government's temporary occupancy. This sum included amounts expended in salaries, packing materials, tools, storage and freight charges. (Offers of Proof, 1 to 32; R. pp. 50-53.) The respondent also offered to prove that it lost the sum of $30,062.92 in the value of equipment destroyed and labor, installation and freight costs on fixed assets as the result of the dismantling of its plant. (Offer of Proof, No. 33; R. pp. 53-54.) The record clearly indicates that, if the respondent had been able to make proof of these expenditures, it would also have proven that they were reasonably and necessarily made, and resulted directly from the temporary taking of its property. (R. p. 54.)

We contend that this evidence should not have been rejected, as it was admissible on two grounds:

1. As pertinent evidence of the rental value; and

2. As pertinent evidence of the diminution of the value of the use of the property during the period of governmental occupancy.

1. As pertinent evidence of the rental value.

In 1866, the Court of Claims of the United States, in its decision in the case of *Johnson v. United States*, 2 Ct. Cl. 391 (1866), established a rule for the measurement of compensation in cases of temporary takings, which it has consistently applied in all such actions.[9]

In the first *Johnson* case (2 Ct. Cl. *supra*), the Army occupied, temporarily, land belonging to Johnson, and in seeking compensation for such occupancy Johnson urged that the measure of his compensation should be the value of the fee. The Court rejected this contention and held that the rule to be applied was that adopted as the measure of damages in actions for *mesne profits*. We quote the reasoning and conclusion of the Court of Claims, as follows, at pp. 415-416:

> "Regarding this, then, as an action on an implied contract, we must determine what it is which the government has taken. The claimant has given evidence of the value of the fee, and insists that it is the measure of his damages. The court is of a different opinion. We think that there is nothing to show such an intent on the

[9] *Johnson v. United States*, 4 Ct. Cl. 248 (1868); *Pope v. United States*, 26 Ct. Cl. 11 (1890); *Johnson v. United States*, 8 Ct. Cl. 243 (1872).

part of the government or to establish anything beyond the temporary occupation already pointed out. We therefore think that the measure of the damages must be limited to the value of this temporary occupancy, as though the claimant had leased and the government had rented the premises, regard being paid to the nature of the occupancy and to the fact that the government had the option of discontinuing the implied tenancy on any day or of retaining it indefinitely. ***This also is the rule which courts have adopted as the measures of damages in actions for mesne profits, and the only rule which can be made applicable to the case.*** We therefore must assume that at the time of the entry upon the premises the claimant was willing to lease and the government was willing to rent the premises with the rights and privileges and upon the conditions before enumerated at the fair or market value of an annual rent; * * *." (Italics ours.)

In the second *Johnson* case (4 Ct. Cl. 248), the Court explained its holding in the parent case, as follows:

"When the case came to be tried, we were satisfied that the government had not taken his property for a fixed military reservation, but, on the contrary, occupied it temporarily and at its own will. It was the first case which had ever come before the court where the question of title to land was in controversy, *and the court had to settle a general principle applicable to all cases which were similar in effect to actions in ejectment, and yet in which the defendants, though defeated, could not be ejected.*

"When a person wrongfully enters upon an estate, he who has the right of possession may evict him; or, if one acquires an apparent right of possession, he who has the actual right may eject him at law, and have damages in the nature of mesne profits for the withholding. But such possessory actions cannot be brought against the government. Though it enters against the consent of the owner *and holds without having a right of property,* it still holds rightfully under its right of eminent domain. The holding being lawful, the question is, upon what terms does the government hold? This question the Constitution answers by the words 'just compensation'. *The use and occupation are private property 'taken for public use', and the supreme law of the land fixes the rent at a 'just compensation'.* It is this provision of the Constitution which upholds our general doctrine of implied contracts; for damages *quantum meruit* are nothing more or less, in the absence of an express contract or of an appraisement by legislative discretion, than the 'just compensation' of the Constitution. We accordingly determined that, when the government has entered upon the realty of a citizen, on his right of property being established, the government should be deemed to have entered as his tenant under an implied lease, whereof the 'just compensation' secured by the Constitution to those whose property is taken for public use should be the rent." (pp. 249-250.) (Italics ours.)

It is to be assumed that the Court of Claims, in applying and adopting a rule derived from actions in ejectment, had in mind that in such actions, as

well as in eminent domain proceedings, the object is to make the owner *whole* for the use and occupancy taken from him, and that to this end the compensation must be sufficient to make good his loss, thereby putting him in as good a position, pecuniarily, as if his property had not been taken; and also that in such actions and proceedings the value of the property to the owner is the only strictly relevant value, and that "market value is acceptable only to the extent that it may be taken as a rough, practical measure of value to the owner." (See *supra*, pp. 8-9.)

In ejectment actions, the rule is that "the desseizee is entitled to all he has lost, be it more or less than the rental value, and additional damages will be awarded, if necessary for making plaintiff *whole.*" (28 *C.J.S.* 1035, *Ejectment,* Sec. 144.)

It follows that a strict application of the rule laid down by the Court of Claims in the *Johnson* case—one derived from actions in ejectment—requires that when the market value of the rental does not make the owner *whole,* this measure of compensation must be disregarded and instead there must be adopted a standard of compensation which includes or comprehends, in the determination of rental value, a consideration of all the damages suffered by the owner.

> "Thus far, in speaking of 'rental value' we have used the term in the restricted sense which the defendant and many of the cases ascribe to it. *There is, however, a broader sense in which the term is used; in the latter use it comprehends all*

that is included in the term 'damages'. * * * (Italics ours.)

Capital Garage Co. v. Powell, 98 Vt. 303, 310, 127 Atl. 375, 378 (1925).

This Court has had, in the past, before it cases involving the expropriation and frustration of contracts, but, so far as we know, the only case ever before presented to this Court involving the temporary deprivation of use of contract rights in real property is that of *International Paper Co. v. United States*, 282 U. S. 399, 51 S. Ct. 176, 75 L. Ed. 410 (1931). This cause did not involve the total expropriation of a contract, as in *Brooks-Scanlon v. United States*, 205 U. S. 106, 44 S. Ct. 471, 68 L. Ed. 943 (1924), nor the frustration of a contract as in *Omnia Commercial Co. v. United States*, 261 U. S. 502, 43 S. Ct. 437, 67 L. Ed. 793 (1923).

In the case of *International Paper Company, supra*, it appears that the Niagara Falls Power Company, by grant, had the right to take water from a certain canal for conversion into electric power. From this canal, the petitioner, the International Paper Company, was entitled, by conveyance and lease, to draw water to run the machinery of a paper mill owned by it—*"a right that by the law of New York was a corporeal hereditament and real estate."* (p. 405.) The United States directed the Niagara Falls Power Company to take the water theretofore used by the International Paper Company and to divert the power generated therefrom to the use of concerns engaged in

industries essential to the national defense. International Paper Company was thus deprived of the use of the water for approximately ten months, and was thereby forced to shut down its paper mill for this period. (pp. 405-406.) When the case was before the Court of Claims (68 Ct. Cl. 414), that Court found that:

(a) the mill could be operated economically only through the use of water and electric power, and that neither was available to the claimant (68 Ct. Cl. 423);

(b) during the period of the shut-down, the mill sustained an actual out-of-pocket or direct overhead expense of $304,685.52, because of the shut-down, and that this loss would not have been sustained if the mill had been able to operate (68 Ct. Cl. 432); and

(c) the price of the power during the period of suspension had increased from $20.00 to $33.00-$47.65 per h.p. per annum. (68 Ct. Cl. 432.)

Notwithstanding the finding of the damage suffered by claimant as a direct result of the shut-down, the Court of Claims dismissed the action, on the ground that claimant's contract rights to water had been frustrated, not taken, and based this ruling on *Omnia Commercial Co. v. United States, supra.* Thereafter, the action came before this Court on a writ of certiorari. The judgment was reversed and this Court, speaking through Mr. Justice Holmes, did not find that the petitioner's contract rights had been taken or frustrated. It found, rather, that its right to use the water had been taken by the United States for the

period of the shut-down, through the exercise of the power of eminent domain. We quote the opinion as follows:

"* * * The petitioner's right was to the use of the water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power, it is hard to see what more the government could do to take the use. It is true that the petitioner did not come within the scope of the government's written promise to pay. But the government purported to be using its power of eminent domain to acquire rights that did not belong to it and for which it was bound by the Constitution to pay. It promised to pay for all the power that the canal could generate. If it failed to realize that the petitioner had a right to a part of the power, its clear general purpose and undertaking was to pay for the rights that it took when it took the power. Phelps v. United States, 274 U. S. 341, 343, 71 L. ed. 1083, 1084, 47 S. Ct. 611; Campbell v. United States, 266 U. S. 368, 370, 371, 69 L. ed. 328-330, 45 S. Ct. 115; United States v. Great Falls Mfg. Co., 112 U.S. 645, 656, 28 L. ed. 846, 850, 5 S. Ct. 306. * * *

"We perceive no difficulty arising from the case of Omnia Commercial Co. v. United States, 261 U. S. 502, 67 L. Ed. 773, 43 S. Ct. 437. There the taking of the whole product of a company went no further than to make it practically impossible for that company to keep a collateral contract to deliver a certain amount of steel to the appellant. But here the government took the property that the petitioner owned as fully as the power company owned the residue of the water

> power in the canal. Our conclusion upon the whole matter is that the government intended to take and did take the use of all the water power in the canal; that it relied upon and exercised its power of eminent domain to that end; that, purporting to act under that power and no other, it promised to pay the owners of that power, * * *." (pp. 407-408.)

We regard it as significant that this Court noted, with respect to the above-referred to findings of the Court of Claims, only that the petitioner's temporary deprivation of the right to use its "real estate" cost it $304,685.36 direct overhead expense.

> "The Court of Claims found that the shutting off of the water from the petitioner's mill cost it $304,685.36, direct overhead expense, but gave judgment that the petition be dismissed." (p. 406.)

We do not say that there is anything in this Court's opinion which would entitle us to claim that this Court held therein that in similar actions the direct losses sustained by the expropriated owner are to be considered in the assessment of compensation, but it does seem to us that the failure of the Court to comment on the market price of the power which could have been generated, and the positive comment on the losses incurred by the petitioner, can be taken as an indication that this Court had in mind that, of the elements found by the Court of Claims, the most important was the owner's loss, and not the price which the temporary use of its property would have commanded

in the open market, nor the benefits derived by the government therefrom.

In the case at bar, as in the *International Paper Company* case, *supra*, the expropriated owner is subjected to as much loss and expense by the temporary relinquishment of its property as if its rights had been taken once and for all time, and yet the government contends that the measure of compensation is the amount that these rights would have brought in the market for a period limited to the time of government use or occupancy.

The inequity of the government's contention and procedure is patent: the expropriated owner is forced to make all the expenditures that an outright sale of his property would have entailed and yet he receives, by way of alleged rental, only a fraction of the value his property would have brought if sold.

The invalidity of the ground upon which the government pretends to sustain its position is equally manifest. Its argument, as we apprehend it from the cases cited, is that *the government's action merely changes the date of the lessee's removal and entails no damage which he would not incur in any event.* The foregoing is the gist of the reasoning adopted by the courts in *Gershon Bros. Co. v. United States*, 284 Fed. 849 (1922), and in *Wm. Wrigley, Jr., Co. v. United States*, 75 Ct. Cl. 569 (1932).

In *Gershon Bros. Co. v. United States*, the Court said, at page 850:

> "* * * Inconvenience and expense incident to vacating premises upon the expiration of the

> right to retain them are not proper subjects of consideration, in determining the just compensation to be paid by the party acquiring the right to possess and use them. * * *"

and in *Wm. Wrigley, Jr., Co. v. United States*, it said (p. 584):

> "* * * The expenses incurred by the plaintiff in moving from the terminal to the new site were those which it would have sustained at the termination of its leases, consequential in their nature, and for which there is no recovery."

In both cases, the reasoning of the Court was that expenses incurred upon *the expiration of the right to retain the property* are not to be considered. That this reasoning is not applicable to the case at bar is patent. The respondent's right to retain the premises *has not expired*, and its lease has not been terminated. We maintain, therefore, that, while the right to retain and occupy the premises subsists, the expense of removal is one which vitally affects the value of the property.

Another ground on which the government seeks to have ignored the loss to the owner is the contention that just compensation, under the Fifth Amendment, is for the property and not for the owner. (Brief for United States, p. 8.) That this is not the interpretation that this Court has placed on the just compensation provided for in the Constitution is clear from the following statement taken from *Boston Chamber of Commerce v. Boston*, 217 U. S. 189, 54 S. Ct. 725, 54 L. Ed. 725 (1910):

"* * * But the Constitution does not require a disregard of the mode of ownership,—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. *It deals with persons, not with tracts of land. And the question is, What has the owner lost? not, What has the taker gained?* * * *" (Italics ours.) (p. 195.)

Accordingly, we contend that the constitutional right of compensation is not limited solely to compensation for the property taken, but encompasses also the owner's loss.

The third and last contention made by the government in support of its position is stated by its counsel as follows:

"The distinction made below between fee takings and the taking of a temporary interest is that what was taken here was not merely the property, but the right to use occupied property. This overlooks the fact that in all cases denying recovery for moving costs where the fee was taken the property was also occupied. Otherwise there would have been no occasion for claiming such expenses. Furthermore, the attempted distinction overlooks the principle that the compensation which the Government must pay for property which it condemns is the fair cash market value as between a willing buyer and a willing seller. * * *" (Brief for United States, p. 14.)

It is true that in the cases where the government took the fee the land was also occupied, but by the taking of the fee the government terminated the occupancy and the right to occupancy. It did not merely interrupt such right, as it has done in the instant case. It is also true that the government's obligation *when it buys property* is limited to hypothetical fair cash market value,[10] but in this case it has not bought the property, nor paid for it. Here it has only taken the use and occupancy of the owner for a temporary period, and the case is, therefore, one "similar in effect to actions in ejectment", where the taker, though defeated, cannot be evicted (4 Ct. Cl., *supra*, p. 249), and where the measure of damages applicable is that adopted in actions for mesne profits. (2 Ct. Cl., *supra*, 415-416.) The application of this rule, when fair rental value does not equal the owner's loss, compels and requires a consideration of all the damages suffered by the owner, otherwise he cannot be made whole.

It is, therefore, submitted that the respondent was entitled to have considered by the jury, in the assessment of rental value, all costs incurred by it in relinquishing its use and occupancy of the property.

2. As pertinent evidence of the diminution of the value of the use of the property during the period of governmental occupancy.

When it is said that the rental value of property temporarily taken should encompass all losses suffered by the owner, it is, in effect, meant that he is to be thereby compensated for the loss or diminution

[10]Bonbright op. cit., Vol. I, pp. 414-417.

of the value in use of the property and, of course, this diminution of the value in use can only be arrived at by a consideration of the costs incurred by the owner as a direct result of the deprivation of the use to which he was devoting his property. Hence, we urge that the respondent has the right to have submitted to the jury for consideration the expenses incurred in relinquishing its property.

The rule on diminution of value is generally stated as follows:

> "* * * Upon the authority of that decision we hold that where injury to real property is temporary, the measure of damages, if the property be rented or held for rent, is the diminution in its rental value during the continuance of the injury; *but, if it be occupied by the owner, it is the diminution in the value of the use of the property during that period, and that this rule applies in measuring damages arising from the temporary appropriation of real property.* * * *" (Italics ours.)
>
> *City of Norwood v. Sheen*, 126 Ohio St. 482, 494, 186 N.E. 102, 87 A.L.R. 1375 (1933).

The practical application of the rule to cases, like the one at bar, where *business property* is occupied by the owner is illustrated by the case of *Vincent v. N. Y. N. H. & H. R. Co.*, 77 Conn. 431, 59 Atl. 491 (1904). There the temporary cutting off of access to business property occupied and used by the owner was interpreted as a temporary "taking" of the property, and the Court held that the measure of damages for this taking was not the mere rental value, for the period of the interrupted access, but the reasonable value of the use of the premises to the owner; and held

further that, in determining the diminution of value in use, there should be considered all expenses directly resulting from the deprivation of use, and, in so holding, the Court stated:

> "If plaintiffs had used these premises merely as a place of residence or for the purpose of renting them, their loss as owners of property so used or rented would probably be fairly measured by the market rental value, or the diminution in such rental value, during the times they were so deprived of access. But where premises are used for manufacturing or business purposes and have been constructed for or adapted to such use, and for that purpose have been furnished with expensive fixtures, machinery and appliances, and a permanent and profitable business has been established at that place, compensation for the diminution in the market value of the premises, or in the mere rental value during the period of interrupted access, is not just compensation for the injury caused by temporarily depriving the owner of the right of access. *When the owner is making such use of the land, it is that use of which he is temporarily deprived, and for the loss or injury to which he is entitled to compensation.* (Italics ours). * * *; it might be unjust to hold the defendant liable for the loss or expense incurred by plaintiffs in continuing to conduct their business in the manner they did; and it might be equally unjust to allow the plaintiffs only the market rental value of the premises during the period of the interrupted access, as compensation for the injury which they must necessarily have sustained either by suspending business entirely during that period, or by using the premises in their impaired condition as well as they could or by moving their business to some

other place. The law does not point out the particular course which the plaintiffs should have pursued, but it does require that their conduct should have been reasonable, both in protecting themselves from injury and in diminishing the loss for which defendant might be liable. *The reasonable value of the use of the premises to the plaintiffs for the purposes of the business for which they were using them, is the value for the diminution of which, caused by such temporary interruption of access, the plaintiffs are entitled to compensation.*

"In determining the diminution of such value, the court should consider the reasonable necessary loss to the plaintiffs in their said business, caused by such interruption of access, including actual loss of trade and loss of profits necessarily caused thereby, *and the reasonably necessary additional labor and expense required to prevent further such loss.* * * *" (442-3) (Italics ours.)

The expenditures necessarily and reasonably made by the owner of property in protecting himself against loss when his right of use and occupancy is interrupted are, of necessity, reflected in the diminution of value in use to him of the property. Whether the expenditures were necessary and reasonable and result directly from the taking will have to be judged in the light of the circumstances under which the property was taken. The expenditures made by the respondent herein may be termed unusual, but they were the direct and proximate result of an unusual and extraordinary act of condemnation. The owner was required to vacate forthwith, surrender the premises in fit condition for the government's occupancy, and was told that the

property might be returned to it at the end of one year or retained for further terms of a year, all this at the government's option. That the usual fiction ordinarily assumed in customary condemnation proceedings, of a "willing seller" and a "willing buyer" and market value frozen as of the date of the taking, may not be assumed here is evident from the mere statement of the facts under which the fictional seller and buyer are supposed to negotiate and bargain. It follows, therefore, that it is not the value of the occupancy to others that controls here, but the value in use or loss thereof to the owner.

C. MERE DIFFICULTY IN ASCERTAINING THE AMOUNT OF COMPENSATION TO BE AWARDED TO RESPONDENT IS NO GROUND FOR DENYING IT.

We are not dealing, here, with that class of cases which denies recovery for future profits or uncertain and speculative losses. The loss herein was immediate. It was sustained and complete even before the government took possession of the property.

The task imposed upon the trier of the facts, of weighing and determining the reasonableness and necessity of the expenditures made in order to arrive at a fair rental, does not present insurmountable difficulties. In *De Laval Steam Turbine Co. v. United States*, 70 Ct. Cl. 51 (affirmed in *De Laval Turbine Co. v. United States*, 284 U. S. 61, 52 S. Ct. 78, 76 L. Ed. 168 (1931)), it is disclosed that the De Laval company bound itself to manufacture and deliver to third parties turbine units for use in a number of vessels: the government requisitioned these contracts, and told the

De Laval company to continue the work for the benefit of the United States, but subject to the right of the United States to cancel the contracts prior to completion. The contracts were in effect, cancelled, and it was held that this cancellation was a "lawful act under the power of eminent domain". (*De Laval Co. v. United States*, 284 U. S. at page 71.) The Court of Claims denied recovery for profits that might have been earned had not the contracts been cancelled, but allowed for the extraordinary expenses incurred by the company as a result of the order of cancellation. The items involved in the award are described as follows, in the opinion of the Court of Claims (70 Ct. Cl. 59):

> "* * * As to all the contracts, plaintiff had all the drawings, jigs, gauges, and fixtures out and distributed for their manufacture, and when the orders to stop work came plaintiff had to move all these, as well as the parts from the tools, and endeavor to provide the shop with other work as soon as possible. This rendered useless the scheduling already done and required the rescheduling of work in the shop. The orders to stop work in conjunction with said schedule change caused confusion, congestion, idleness by machine operators, and machine tools, and interference with the efficiency of plaintiff's operations, and additional clerical work, the cost of which to plaintiff amounted to $30,000."

The many and disparate items of expense incurred by the De Laval company did not present an insurmountable obstacle to the determination of its "just compensation" and it seems to us, therefore, that the mere difficulty of ascertainment should not be a ground for denying respondent herein its compensation.

It should be noted that in the *De Laval* case the expenditures resulted from the cancellation of a contract which the company knew was subject to termination at the option of the government. In this case, the expenditures have resulted from a temporary taking of respondent's contract, and we submit that, in principle, there is no difference between the cases. In one case, compensation was given because of a loss that would not have occurred except for the cancellation of the contract, and, by the same token, it is just that in the present cause losses which would not have been incurred except for the temporary taking of respondent's property rights should be considered in awarding compensation.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the measure of compensation to which respondent is entitled under the Fifth Amendment is not fixed by the fair rental value of its property to others, but by the loss of the value in use thereof to respondent, which loss encompasses a consideration of all expenditures necessarily resulting from the temporary taking.

Dated, San Francisco, California,
November 6, 1944.

Respectfully submitted,

PHILIP S. EHRLICH,
Counsel for Zellerbach Paper Company, (a corporation), Amicus Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 76.—October Term, 1944.

The United States of America, Petitioner, *vs.* General Motors Corporation.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 8, 1945.]

Mr. Justice Roberts delivered the opinion of the Court.

This case is one of first impression in this court. It presents a question on which the decisions of federal courts are in conflict.[1] The problem involved is the ascertainment of the just compensation required by the Fifth Amendment of the Constitution, where, in the exercise of the power of eminent domain, temporary occupancy of a portion of a leased building is taken from a tenant who holds under a long term lease.

Section 201 of Tit. II of the Second War Powers Act of March 27, 1942,[2] provides, in part, that the Secretary of War may cause proceedings to be instituted, in any court having jurisdiction, to acquire, by condemnation, any real property, temporary use thereof, or other interest therein which shall be deemed necessary for military or other war purposes. The Act provides further that, on or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, or improved.

In 1928 the respondent leased a one story warehouse building in Chicago for a term of twenty years, for the storage and distribution of automobile parts, and fitted the premises for this use. In 1942 the United States became sub-tenants of a portion of the floor space in the building. There remained in the possession of the respondent some 93,000 square feet. In the spring of 1942

[1] Compare with the decision below, 140 F. 2d 873, Gershon Bros. Co. v. United States, 284 Fed. 849; National Laboratory & Supply Co. v. United States, 275 Fed. 218; United States v. Entire Fifth Floor, 54 F. Supp. 258; United States v. Improved Premises, 54 F. Supp. 469; United States v. Certain Parcels of Land, 54 F. Supp. 561; United States v. 0.64 Acres of Land, 54 F. Supp. 562; United States v. Building Known as 651 Brannan Street, 55 F. Supp. 667; Wm. Wrigley Jr. Co. v. United States, 75 Ct. Cls. 569; Howard Co. v. United States, 81 Ct. Cls. 646.

[2] c. 199, 56 Stat. 176, 177, 50 U. S. C. App. § 632.

the Secretary of War requested the Attorney General to institute proceedings for condemnation of the occupancy of the remaining space for a term ending June 30, 1943. Pursuant to the request, the United States, June 8, 1942, filed a petition in the District Court for an order condemning such temporary use and granting the Government the right of immediate possession, use, and improvement for military purposes. On the same day the court entered an order declaring the property condemned for a term ending June 30, 1943, and granting the United States the right of immediate possession. The order was served on the respondent and shortly thereafter it began removing its personal property from the area and dismantling and demolishing bins and fixtures, so that the space was available for government use by June 19.

At the trial for the ascertainment of the compensation due the respondent, the attorney for the Government, after proving the authority for the taking, called a real-estate expert who gave his opinion that the fair rental value of the space was 35 cents per year per square foot. The Government then rested.

The respondent called expert witnesses who testified that, in their opinion, the fair rental value was 43 cents per square foot, and a witness was permitted to testify that the rent paid by the respondent to its landlord had varied during the years 1940 to 1942, inclusive, from 41.9 to 43.24 cents.

The respondent then offered to prove various items of cost caused by removal of the contents. These consisted, *inter alia*, of salaries of employes engaged in the work, compensation due employes put out of work by the removal, wages of janitors and watchmen for the protection of the building during the moving, the cost of shipping the contents of the building to other points, compensation to executives and employes whose time was required in connection with the moving of the property, freight and haulage charges, rental of storage space for articles moved out, the value of the bin equipment destroyed and the estimated original cost of the installation of fixed equipment completely lost as a result of the dismantling of the area. The court sustained an objection to the offer. The jury awarded compensation in a lump sum at a rate of approximately 40 cents per square foot for the term of one year.[3]

[3] After judgment had been entered on the verdicts, the court, on the Government's motion, opened the judgment and permitted the Government to amend its petition for condemnation to describe the interest taken as "a term for years . . . expiring June 30, 1943, renewable for additional yearly

The respondent appealed to the Circuit Court of Appeals, assigning as error the refusal of its offer of proof. That court might have sustained the District Court's ruling on the ground that respondent was not entitled to prove certain of the expenditures and losses in question as independent items of damages additional to the value of the interest taken by condemnation. The court, however, considering substance rather than form, by a vote of 2 to 1, reversed the judgment, holding that items of actual loss which were the direct and necessary result of the respondent's exclusion from the leased area might be proved, not as independent items but as elements to be considered in arriving at the sum which would be just compensation for the interest which the Government condemned. The cause was remanded for trial in accordance with the ruling of the Circuit Court of Appeals. We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case. The correctness of the decision of the court below depends upon the scope and meaning of the constitutional provision: "nor shall private property be taken for public use, without just compensation", which conditions the otherwise unrestrained power of the sovereign to expropriate, without compensation, whatever it needs.

The critical terms are "property," "taken" and "just compensation". It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.[4] When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers

periods thereafter . . . at the election of the Secretary of War", on specified notice of intent so to renew. The court then entered a new judgment awarding the amount of the verdict to respondent and retaining jurisdiction for the ascertainment of further compensation for damage to the property, if any, beyond ordinary wear and tear, due to the Government's occupancy. We do not understand that these facts alter the question before us. The case now presented involves only the original taking for one year. If, on remand, the case be treated as involving the Government's option of renewal, the additional value of that interest must be included in the compensation awarded. We express no opinion as to the Government's power to condemn service, such as the furnishing of heat [illegible] ght.

[4] Lewis, Eminent Domain, 3d Ed., §§ 63, 64.

term the individual's "interest" in the thing in question. That interest may comprise the group of rights for which the shorthand term is "a fee simple" or it may be the interest known as an "estate or tenancy for years", as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess.

In its primary meaning, the term "taken" would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.[5]

But it is to be observed that whether the sovereign substitutes itself as occupant in place of the former owner, or destroys all his existing rights in the subject matter, the Fifth Amendment concerns itself solely with the "property", i. e., with the owner's relation as such to the physical thing and not with other collateral interests which may be incident to his ownership.

In the light of these principles it has been held that the compensation to be paid is the value of the interest taken. Only in the sense that he is to receive such value is it true that the owner must be put in as good position pecuniarily as if his property had not been taken. In the ordinary case, for want of a better standard, market value, so-called, is the criterion of that value. In some cases this criterion cannot be used either because the interest condemned has no market value or because, in the circumstances, market value furnishes an inappropriate measure of actual value.

In the trial of this case the parties presented evidence of the market value of the occupancy of bare floor space for the term taken. The respondent's offer to prove additional items for which it claimed compensation was overruled. The award was therefore limited to the market value of the occupancy of a vacant building. The question is whether any other element of value inhered in the interest taken.

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[5] See, e. g., United States v. Welch, 217 U. S. 333; Richards v. Washington Terminal Co., 233 U. S. 546.

The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. No doubt all these elements would be considered by an owner in determining whether, and at what price, to sell. No doubt, therefore, if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered. But the courts have generally held that they are not to be reckoned as part of the compensation for the fee taken by the Government.[6] We are not to be taken as departing from the rule they have laid down, which we think sound. Even where state constitutions command that compensation be made for property "taken or damaged" for public use, as many do, it has generally been held that that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and that damage to those rights of ownership does not include losses to his business or other consequential damage.[7]

The question posed in this case then is, shall a different measure of compensation apply where that which is taken is a right of temporary occupancy of a building equipped for the condemnee's business, filled with his commodities, and presumably to be reoccupied and used, as before, to the end of the lease term on the termination of the Government's use? The right to occupy, for a day, a month, a year, or a series of years, in and of itself and without reference to the actual use, needs, or collateral arrangements of the occupier, has a value. The value of that interest is affected, of course, by the kind of building to be occupied, by its location, by its susceptibility to various uses, by its conveniences, or the reverse, and by many other factors which go to set the value of the occupancy. These were taken into consideration in fixing the market value of the floor space taken, as if that space were bare and in the market for rent.

While, as has been said, the Government's power to take for a short period, and to demand possession of the space taken freed of

[6] Bothwell *v.* United States, 254 U. S. 231; Mitchell *v.* United States, 267 U. S. 341; Mullen Benevolent Corp. *v.* United States, 290 U. S. 89; Orgel, Valuation under Eminent Domain, Chap. V, pp. 220-252.

[7] Orgel, *op. cit.*, p. 253.

all equipment or personal property therein, cannot be denied, three questions emerge which are not presented when what is taken is a fee interest in land. They are: 1. Is the long-term rental value the sole measure of the value of such short-term occupancy carved out of the long term? 2. If the taking necessitates the removal of personal property stored in the building in conformity to the normal use of such a building, is the necessary expense of the removal to be considered in computing compensation? 3. If a tenant's equipment and fixtures are taken or destroyed, or reduced in value, by the Government's action, must it compensate for the value thus taken or destroyed in addition to paying the rental value of the occupancy?

1. If the Government need only pay the long-term rental of an empty building for a temporary taking from the long-term tenant a way will have been found to defeat the Fifth Amendment's mandate for just compensation in all condemnations except those in which the contemplated public use requires the taking of the fee simple title. In any case where the Government may need private property, it can devise its condemnation so as to specify a term of a day, a month, or a year, with optional contingent renewal for indefinite periods, and with the certainty that it need pay the owner only the long term rental rate of an unoccupied building for the short term period, if the premises are already under lease or, if not, then a market rental for whatever minimum term it may choose to select, fixed according to the usual modes of arriving at rental rates. And this, though the owner may be damaged by the ouster ten, a score, or perhaps a hundred times the amount found due him as "fair rental value." In the present case the respondent offered to prove that the actual expense of moving its property exceeded $46,000, and the loss due to destruction and removal of fixtures and fixed equipment exceeded $31,000, in addition to its continuing liability to pay rent for the year of approximately $40,000; whereas the award was $38,597.86. If such a result be sustained we can see no limit to utilization of such a device; and, if there is none, the Amendment's guaranty becomes, not one of just compensation for what is taken, but an instrument of confiscation fictionalizing "just compensation" into some such concept as the common law idea of a peppercorn in the law of seizin or the later one of "value received" in that of contractual consideration. If the value to be paid in a case like the present is confined, as matter of law, to

the long term rental of bare space, the owner will not be secure, either in his rights of property, or in his right to just compensation as a substitute for it, when the Government takes it for the use and benefit of all. Here the use of a warehouse for a short time was taken. The property might have been the General Motors factory. Or several plants. Or a modest store or home. Whatever of property the citizen has the Government may take. When it takes the property, that is, the fee, the lease, whatever he may own, terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of "consequential damage" as that conception has been defined in such cases. Even so, the consequences often are harsh. For these whatever remedy may exist lies with Congress.

It is altogether another matter when the Government does not take his entire interest, but by the form of its proceeding chops it into bits, of which it takes only what it wants, however few or minute, and leaves him holding the remainder, which may then be altogether useless to him, refusing to pay more than the "market rental value" for the use of the chips so cut off. This is neither the "taking" nor the "just compensation" the Fifth Amendment contemplates. The value of such an occupancy is to be ascertained, not by treating what is taken as an empty warehouse to be leased for a long term, but what would be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier. The case should be retried on this principle. In so ruling we do not suggest that the long-term rental value may not be shown as bearing on the market rental value of the temporary occupancy taken. It may be evidence of the value of what is taken but it is not the criterion of value in such a case as this.

2. Some of the elements which would certainly and directly affect the market price agreed upon by a tenant and a sublessee in such an extraordinary and unusual transaction would be the reasonable cost of moving out the property stored and preparing the space for occupancy by the subtenant. That cost would include labor, materials, and transportation. And it might also include the storage of goods against their sale or the cost of their return to the leased premises. Such items may be proved, not as independent items of damage but to aid in the determination of what would be the usual—the market—price which would be asked and paid for

such temporary occupancy of the building then in use under a long term lease. The respondent offered detailed proof of amounts actually and necessarily paid for these purposes. We think that the proof should have been received for the purpose and with the limitation indicated.[8] Proof of such costs as affecting market value is to be distinguished from proof of value peculiar to the respondent, or the value of good-will or of injury to the business of the respondent which, in this case, as in the case of the condemnation of a fee, must be excluded from the reckoning.

3. For fixtures and permanent equipment destroyed or depreciated in value by the taking, the respondent is entitled to compensation. An owner's rights in these are no less property within the meaning of the Fifth Amendment than his rights in land and the structures thereon erected. And it matters not whether they were taken over by the Government or destroyed, since, as has been said, destruction is tantamount to taking.[9] This is true whether the fixtures and equipment would be considered such as between vendor and vendee,[10] or as a tenant's trade fixtures.[11] In respect of them, the tenant whose occupancy is taken is entitled to compensation for destruction, damage or depreciation in value.[12] And since they are property distinct from the right of occupancy such compensation should be awarded not as part of but in addition to the value of the occupancy as such.

The judgment of the Circuit Court of Appeals, as modified by this opinion, is

Affirmed.

The CHIEF JUSTICE, Mr. Justice FRANKFURTER and Mr. Justice MURPHY took no part in the consideration or decision of this case.

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[8] Patterson v. City of Boston, 23 Pick. (Mass.) 425; Getz v. Phila. & Reading R. Co., 105 Pa. 547; Phila. & Reading R. Co. v. Getz, 113 Pa. 214; McMillin Ptg. Co. v. Pittsburgh C. & W. R. Co., 216 Pa. 504; North Coast R. Co. v. Kraft, 63 Wash. 250; National Laboratory & Supply Co. v. United States, 275 Fed. 218.

[9] *Supra*, Note 5.

[10] Jackson v. State of New York, 213 N. Y. 34.

[11] In re Block Bounded, etc., 122 N. Y. Supp. 321; In re Willcox, 151 N. Y. Supp. 141; Bales v. Wichita M. V. R. Co., 92 Kan. 771; In re Water Front, 219 N. Y. Supp. 353; Matter of City of New York, 256 N. Y. 236; In re Widening of Gratiot Ave., 294 Mich. 569; cf. Pause v. City of Atlanta, 98 Ga. 92.

[12] United States v. Seagren, 50 F. (2d) 333; In the Matter of the Application of the City of New York, 118 App. Div. (N. Y.) 865; City of St. Louis v. St. Louis I. M. & S. R. Co., 266 Mo. 694; People v. Ganahl Lumber Co., 75 P. 2d (Cal.) 1067; and cases cited in Note 11.

SUPREME COURT OF THE UNITED STATES.

No. 76.—October Term, 1944.

The United States of America, Petitioner, *vs.* General Motors Corporation.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 8, 1945.]

Mr. Justice Douglas, concurring in part.

I agree that respondent is entitled to compensation for fixtures and permanent equipment destroyed or depreciated in value by the taking. I likewise agree that respondent is entitled to a further increase in its award. The award granted is less than the rental which it is under a continuing obligation to pay the lessor. The United States is occupying the premises and paying about 40¢ a square foot while respondent continues to pay 42¢ to the landlord. In these special circumstances it is difficult to see how a lessee receives that just compensation to which he is entitled unless the United States pays the full rental. It would indeed be a novel rule of law which allowed the Government to oust a person from a portion of his leasehold, occupy the premises, but pay only a part of the rent, leaving the balance to be paid by him who though ousted holds the balance of the term. But I do not believe we should allow the cost of removing personal property from the premises to be reflected in the award. If this were a fee interest which was being condemned, we would exclude all such expenses from the award. Consequential losses or injuries resulting from the taking are not compensable under the Fifth Amendment. *Mitchell* v. *United States*, 267 U. S. 341; *United States* v. *Miller*, 317 U. S. 369, 376; *United States* v. *Powelson*, 319 U. S. 266, 281-283. It takes an Act of Congress to make them so. We should adhere to that rule. If we allow consequential damages to be shown here, I do not see how we can refuse such an offer of proof when a 10 year lease, a 99 year lease, or a fee interest is condemned. If cost of moving is relevant to market price in one case, I cannot say it is irrelevant in the other. And if one type of consequential damage is relevant to market price, I do not see

why almost any type may not be. If we allow the offer of proof in the present case, the result will be to let consequential damages in under a new guise. If we take that step we demonstrate that hard cases do indeed make bad law. We give the Constitution an interpretation which promises swollen verdicts which no Act of Congress can cure.

Mr. Justice BLACK joins in this opinion.